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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

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6 TITO BARRON-AGUILAR,

Case No. 3:17-cv-00548-MMD-CLB

7 Petitioner,

ORDER

8 v.

9 HAROLD WICKHAM, *et al.*,

10 Respondents.

11 **I. SUMMARY**

12 This habeas matter is before the Court on Respondents' motion to dismiss (ECF
13 No. 43 ("Motion")).¹ For the reasons discussed below, Respondents' Motion is denied.

14 **II. BACKGROUND²**

15 Petitioner Tito Barron-Aguilar challenges a 2014 conviction and sentence imposed
16 by the Second Judicial District Court for Washoe County ("state court"). See *State v.*
17 *Barron-Aguilar*, Case No. CR14-0605 (Nev. Dist. Ct. 2014). Following a jury trial,
18 Petitioner was found guilty of: (1) four counts of unlawful sale of a controlled substance;
19 (2) three counts of trafficking in a controlled substance; and (3) one count of conspiracy
20 to violate the Uniform Controlled Substances Act. (ECF No. 21-3.) The state court entered
21 a judgment of conviction on October 15, 2014. The court sentenced Petitioner to 25 years
22 with parole eligibility after a minimum of 10 years for one trafficking count with an
23 aggregate of 24-84 months on two other counts, running consecutive to the trafficking
24 count, and 74-300 months on the remaining five counts, running concurrently to the
25 trafficking count. (ECF No. 23-11.)

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27 ¹The Court has reviewed Petitioner's response (ECF No. 46) and Respondents'
reply (ECF No. 56).

28 ²This procedural history is derived from exhibits located at ECF Nos. 21, 22, 23,
and 35 on the Court's docket.

1 Petitioner appealed and the Nevada Supreme Court affirmed the conviction on
2 direct appeal. (ECF No. 27-5.) Petitioner sought post-conviction relief in a *pro se* state
3 petition for writ of habeas corpus (ECF No. 27-8), which the state court denied. (ECF
4 No. 27-15.) The Nevada Supreme Court affirmed the denial of relief. (ECF No. 27-24.)
5 On September 8, 2017, Petitioner initiated this federal habeas proceeding *pro se*. (ECF
6 No. 1.) This Court appointed counsel on initial review and granted leave to amend the
7 petition. (ECF No. 4.) Petitioner filed a counseled first amended petition for writ of habeas
8 corpus (ECF No. 11 (“First Amended Petition”)) alleging five grounds for relief.

9 Petitioner acknowledged that Grounds C, D, and E of his First Amended Petition
10 were unexhausted. (*Id.* at 15, 18, 21.) Respondents moved to dismiss certain claims as
11 unexhausted. (ECF No. 19.) Petitioner responded by requesting a stay and abeyance to
12 exhaust his state remedies. (ECF No. 28.) The Court stayed this action pending
13 exhaustion of his claims in Nevada state courts and denied Respondents’ dismissal
14 motion without prejudice. (ECF No. 32.)

15 In June 2018, Petitioner filed a second state petition for writ of habeas corpus (ECF
16 No. 35-12 (“Second State Petition”)), asserting claims identical to Grounds B, C, D, and
17 E of the First Amended Petition. The Second State Petition was denied as untimely and
18 successive. (ECF No. 35-19.) The Nevada Supreme Court affirmed the denial of relief.
19 (ECF No. 35-30.) In July 2020, this Court granted Petitioner’s unopposed request to
20 reopen this case and set a schedule to complete briefing. (ECF Nos. 34, 36, 37.) The
21 Court instructed Petitioner to further amend his petition to update the procedural history
22 and statements of exhaustion to include the recent post-conviction proceedings in
23 Nevada state courts regarding the Second State Petition without supplementing or
24 altering the claims alleged in the First Amended Petition. (*Id.*) Petitioner timely filed a
25 second amended petition for writ of habeas corpus (ECF No. 38 (“Second Amended
26 Petition”)).

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1 Respondents renew their motion to dismiss. Given the recent state proceedings in
2 Nevada state courts, Respondents argue Grounds B³, C, D, and E are procedurally
3 defaulted and/or barred.

4 **III. DISCUSSION**

5 Federal courts are barred from considering a state inmate's habeas claim if the
6 state courts denied his or her claim based on an independent and adequate state
7 procedural rule. See *Edwards v. Carpenter*, 529 U.S. 446, 454-55 (2000). Nevada's one-
8 year statute of limitation⁴ for post-conviction petitions and prohibition on second or
9 successive post-conviction petitions are independent and adequate state procedural
10 rules as applied in non-capital cases. See, e.g., *Williams v. Filson*, 908 F.3d 546, 580 (9th
11 Cir. 2018); *Bargas v. Burns*, 179 F.3d 1207, 1211-14 (9th Cir. 1999). Additionally, a
12 federal court may consider a claim procedurally defaulted where "it is clear that the state
13 court would hold the claim procedurally barred." *Sandgathe v. Maass*, 314 F.3d 371, 376
14 (9th Cir. 2002). When a petitioner "procedurally defaults" a federal claim, judicial review
15 is barred unless he or she can show either: (1) "cause for the default and actual prejudice
16 as a result of the alleged violation of federal law," or (2) "that failure to consider the claims
17 will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722,
18 750 (1991); *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (stating that the miscarriage
19 of justice exception ensures "that federal constitutional errors do not result in the
20 incarceration of innocent persons.").

21 To demonstrate cause, the petitioner must show that some external and objective
22 factor impeded his or her efforts to comply with the procedural rule. See *Maples v.*
23 *Thomas*, 565 U.S. 266, 280-81 (2012). Ignorance or inadvertence does not establish
24 cause. See *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986). To show prejudice, a
25 petitioner must prove not merely that the error created a possibility of prejudice, but that
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27 ³Respondents, however, withdrew their request to dismiss Ground B as
28 procedurally barred after Petitioner filed his opposition. (ECF No. 56 at 2.)

⁴NRS § 34.726; NRS § 34.810(2).

1 the error worked to his or her actual and substantial disadvantage, infecting the entire
2 proceeding with constitutional error. See *Carrier*, 477 U.S. at 494; *Bradford v. Davis*, 923
3 F.3d 599, 613 (9th Cir. 2019). To demonstrate a fundamental miscarriage of justice, a
4 petitioner must show that the constitutional error complained of probably resulted in the
5 conviction of an innocent person. See *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir.
6 1998). This is a narrow exception, and it is reserved for extraordinary cases only. See
7 *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992).

8 **A. Ground C**

9 In Ground C, Petitioner alleges that he was denied due process of law and a fair
10 trial under the Fifth, Sixth, and Fourteenth Amendments where the State of Nevada failed
11 to disclose, or correct, information about the benefit the confidential informant received
12 because of his cooperation with the State, and where the State failed to disclose the
13 confidential informant's criminal record. (ECF No. 38 at 20.) For this claim, Petitioner
14 relies on *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Napue v. Illinois*, 360 U.S. 264
15 (1959). Respondents argue that Ground C is procedurally barred because the Nevada
16 Supreme Court held that Petitioner's Second State Petition was untimely and successive.
17 (ECF No. 43 at 7.)

18 Relying on *Cooper v. Neven*, 641 F. 3d 322, 332 (9th Cir. 2011), Petitioner argues
19 the Nevada Supreme Court's procedural holding was not independent of federal law,
20 therefore, Ground C is not barred. (ECF No. 46 at 11-12.) Petitioner asserts that the
21 court's state procedural default analysis was interwoven with federal law because it
22 considered the merits of Petitioner's *Brady* claim, and the *Brady* analysis controlled the
23 outcome of whether Petitioner established good cause and prejudice to overcome the
24 state procedural bar to relief. (*Id.*) Respondents argue that the court's conclusion that
25 Petitioner's Second State Petition was untimely was not based on federal law and that
26 the court applied *Brady* solely to determine Petitioner did not establish good cause or
27 actual prejudice. (ECF No. 56 at 2-3.) Respondents further argue that *Cooper* is "bad law"

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1 because “a procedural default determination is separate from and independent of the
2 good cause and actual [sic] determination analysis.” (*Id.* at 3.)

3 A state procedural rule constitutes an “independent” bar if it is not interwoven with
4 federal law or dependent upon a federal constitutional ruling. See *Ake v. Oklahoma*, 470
5 U.S. 68, 75 (1985); *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001). “A state law
6 ground is so interwoven if ‘the state has made application of the procedural bar depend
7 on an antecedent ruling on federal law [such as] the determination of whether federal
8 constitutional error has been committed.’” *Park v. California*, 202 F.3d 1146, 1152 (9th
9 Cir. 2000) (*quoting Ake*, 470 U.S. at 75). Here, the Nevada Supreme Court affirmed that
10 Petitioner’s Second State Petition was untimely and successive. (Ex. 51.) However, in
11 ruling that Petitioner did not establish cause and prejudice to excuse the procedural bar,
12 the state court considered two of the three elements of the federal *Brady* claim. (*Id.*)
13 Accordingly, as the Ninth Circuit Court of Appeals held in *Cooper*, under these
14 circumstances, the Nevada Supreme Court’s decision did not rest on an independent and
15 adequate state ground and does not bar federal habeas review. See *Cooper*, 641 F. 3d
16 at 333. Respondents’ request to dismiss Ground C as procedurally barred is denied.

17 **A. Grounds D and E**

18 In Ground D, Petitioner alleges that his counsel rendered ineffective assistance
19 because trial counsel failed to object to jury instructions that allowed Petitioner to receive
20 a higher mandatory sentence when the requisite element was not found by the jury
21 beyond a reasonable doubt. (ECF No. 38 at 24.) In Ground E, Petitioner alleges that
22 counsel rendered ineffective assistance due to counsel’s deficient handling of the
23 confidential informant. (*Id.* at 28.) Respondents contend dismissal is warranted because
24 the Nevada Supreme Court applied state procedural bars when the court affirmed denial
25 of Petitioner’s Second State Petition. (ECF No. 43 at 7-8.)

26 Petitioner argues that he can demonstrate good cause and prejudice to excuse
27 procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), because he did not have
28 counsel during his initial post-conviction proceedings. (ECF No. 46 at 13.) Respondents

1 request that the *Martinez* analysis be deferred to the answer. (ECF No. 56 at 3.)
2 Respondents did not provide a substantive response to Petitioner's cause and prejudice
3 arguments.

4 "Generally, post-conviction counsel's ineffectiveness does not qualify as cause to
5 excuse a procedural default." *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019) (citing
6 *Coleman*, 501 U.S. at 754-55). However, in *Martinez*, the United States Supreme Court
7 created a narrow exception to the general rule that errors of post-conviction counsel
8 cannot provide cause for a procedural default. *Id.* at 16-17. The United States Supreme
9 Court held that the absence or inadequate assistance of counsel in an initial review
10 collateral proceeding may be relied upon to establish cause excusing the procedural
11 default of a claim of ineffective assistance of trial counsel. *Id.* at 9.

12 The Nevada Supreme Court does not recognize *Martinez* as cause to overcome a
13 state procedural bar under Nevada state law. See *Brown v. McDaniel*, 130 Nev. 565, 331
14 P.3d 867, 875 (Nev. 2014). Therefore, a Nevada habeas petitioner who relies upon
15 *Martinez*—and only *Martinez*—as a basis for overcoming a state procedural bar on an
16 unexhausted claim can successfully argue that the state courts would hold the claim
17 procedurally barred, but that he or she nonetheless has a potentially viable cause and
18 prejudice argument under federal law that would not be recognized by the state courts
19 when applying the state procedural bars.

20 To establish cause and prejudice for a trial-level ineffective-assistance-of-counsel
21 ("IAC") claim under *Martinez*, a petitioner must show that:

22 (1) post-conviction counsel performed deficiently; (2) there was a
23 reasonable probability that, absent the deficient performance, the
24 result of the post-conviction proceedings would have been
25 different, and (3) the underlying ineffective-assistance-of-trial-
counsel claim is a substantial one, which is to say that the prisoner
must demonstrate that the claim has some merit.

26 *Ramirez*, 937 F.3d at 1242 (internal quotations omitted). The *Martinez* test relies on
27 *Strickland v. Washington*, 466 U.S. 668 (1984), for its first and second "cause" prongs.
28 *Id.* at 1241. Notably, a federal district court's determination of the second prong—whether

1 there was a reasonable probability that the result of the post-conviction proceedings
2 would be different—“is necessarily connected to the strength of the argument that trial
3 counsel’s assistance was ineffective.” *Id.* (quoting *Clabourne v. Ryan*, 745 F.3d 362, 377
4 (9th Cir. 2014)). The third “prejudice” prong directs courts to assess the merits of the
5 underlying trial-level IAC claim. *Ramirez*, 937 F.3d at 1241. A procedural default will not
6 be excused if the underlying IAC claim “is insubstantial,” *i.e.*, it lacks merit or is “wholly
7 without factual support.” *Id.* (quoting *Martinez*, 566 U.S. at 14-16).

8 This Court finds that the cause-and-prejudice analysis of Grounds D and E is
9 necessarily connected to the merits of the claims themselves and will defer a
10 determination on both questions until a merits determination. Accordingly, Respondents’
11 Motion is therefore denied without prejudice on those grounds. Respondents may renew
12 their procedural default arguments in their answer.

13 **IV. CONCLUSION**

14 It is therefore ordered that Respondents’ motion to dismiss (ECF No. 43) is denied
15 as follows:

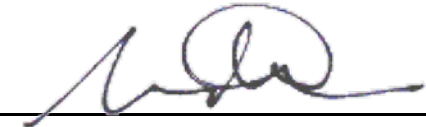
- 16 1. Respondents’ request to dismiss Ground C as procedurally barred is
17 denied.
- 18 2. Respondents’ request to dismiss Grounds D and E is denied without
19 prejudice. A decision on whether Petitioner can demonstrate cause and
20 prejudice under *Martinez* as to Grounds D and E is deferred until after the
21 parties have answered and replied.

22 It is further ordered that Respondents shall file an answer to the Second Amended
23 Petition (ECF No. 38) within 60 days of entry of this order. The answer must include
24 substantive arguments on the merits as to each surviving claim, in addition to raising any
25 procedural defenses authorized by this order. In filing the answer, Respondents must
26 comply with the requirements of Rule 5 of the Rules Governing Section 2254 Cases in
27 the United States District Courts.

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1 It is further ordered that Petitioner will have 60 days following service of the answer
2 to file and serve a reply brief.

3 DATED THIS 29th Day of June 2021.

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8 MIRANDA M. DU
9 CHIEF UNITED STATES DISTRICT JUDGE
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